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7 STRIKE 3 HOLDINGS, LLC,
8 Plaintiff,
9 v.
10 JOHN DOE SUBSCRIBER ASSIGNED IP
11 ADDRESS 73.63.224.184,
12 Defendant.

13 Case No. 21-cv-06886-RS
14

15
16 **ORDER GRANTING LEAVE TO ISSUE
17 THIRD PARTY SUBPOENA**

18 **I. INTRODUCTION**

19 Strike 3 seeks a subpoena to unmask someone sharing its copyrighted adult pornography,
20 as it does thousands of times every year. Strike 3 has determined Defendant's Internet Protocol
21 ("IP") address, but cannot determine the account owner without a subpoena. An IP address may be
22 shared widely—but only has one account owner. Many have raised concerns that Strike 3 is
23 effectively extorting account owners through these lawsuits, because they are embarrassed into
24 settling, even if they are innocent. All the same, the law provides Strike 3 with the right to its
25 subpoena. To ensure no prejudice to the possibly innocent account owner, courts routinely protect
26 the identity of defendants in these cases until, at least, further discovery reveals some information
27 about them and whether they are at all likely to be the perpetrator. Leave to issue the subpoena is
28 granted with these protective measures in place. Defendant can proceed anonymously until that
individual can assert a defense. Also, Strike 3 must fulfill its promise to propose confidentiality.
Defendant must be informed of these measures.

II. BACKGROUND¹

Plaintiff, Strike 3, is a successful producer of pornographic videos which are often distributed illegally. Strike 3 pleads that it only files suit against large-scale infringers. It identified the IP address of a BitTorrent user who distributed 70 of their titles without authorization. Strike 3 cannot proceed without a subpoena to the Internet Service Provider (“ISP”) associated with the IP address for the name of the account owner. Strike 3 has tried obtaining the identity in other ways and failed. However, they have determined that the IP address traces to somewhere in this district. ISPs routinely delete this information after a certain time. Thus, Strike 3 filed an *ex parte* application for leave to serve a third-party subpoena to the ISP before a Rule 26(f) conference, pursuant to Rule 45. Strike 3 is mindful of the controversy surrounding its litigation practices and claims it has a policy of entering into confidentiality agreements and not proposing settlement, to mitigate the risk of pressuring people into unjust settlements.

III. LEGAL STANDARD

A court may authorize early discovery before the Rule 26(f) conference for the parties’ and witnesses’ convenience and in the interests of justice. Fed. R. Civ. P. 26(d). Courts within the Ninth Circuit generally consider whether a plaintiff has shown “good cause” for early discovery. *See, e.g., Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275–77 (N.D. Cal. 2002). “Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.” *Id.* at 276.

In evaluating whether a plaintiff establishes good cause to learn the identity of a Doe defendant through early discovery, courts examine whether the plaintiff: (1) identifies the Doe defendant with sufficient specificity that the court can determine if the defendant is a real person who can be sued in federal court, (2) recounts the steps taken to locate and identify the defendant, (3) demonstrates the action can withstand a motion to dismiss, and (4) shows the discovery is

¹ The factual background is based on the allegations in the complaint, which must be taken as true for this motion. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

1 reasonably likely to lead to identifying information that will permit service of process. *Columbia*
2 *Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578–80 (N.D. Cal. 1999) (citations omitted).
3 “[W]here the identity of alleged defendants [is not] known prior to the filing of a complaint[,] the
4 plaintiff should be given an opportunity through discovery to identify the unknown defendants,
5 unless it is clear that discovery would not uncover the identities, or the complaint would be
6 dismissed on other grounds.”” *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999)
7 (quoting *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)).

8 IV. DISCUSSION

9 A. Strike 3’s Pattern of Litigation

10 Strike 3 has been labeled by some as a “copyright troll” that files extortionate lawsuits. *Strike*
11 *3 Holdings, LLC v. Doe*, 351 F. Supp. 3d 160, 161 (D.D.C. 2018), *rev’d and remanded* 964 F.3d
12 1203, 1205 (D.C. Cir. 2020). In its detractors’ view, it profits from “the nexus of antiquated
13 copyright laws, paralyzing social stigma, and unaffordable defense costs.” *Ingenuity 13 LLC v.*
14 *Doe*, Case No. 2:12-cv-8333-ODW(JCx), (C.D. Cal. May. 6, 2013). They posit that the scheme
15 works like this: Strike 3 identifies thousands of IP addresses per year that uploaded its copyrighted
16 material. *Strike 3*, 351 F. Supp. 3d at 162 (summarizing many cases). It files thousands of
17 lawsuits, and attempts to subpoena the subscriber information. When it succeeds, the subscriber
18 learns he or she is being sued for uploading pornography. To save themselves embarrassment,
19 they usually settle for just less than the cost of defending the suit. Their alternative is to pay high
20 legal fees for a specialist in copyright law, and hope the court lets them proceed anonymously.
21 When a defendant does put up any fight, the company usually drops the case.

22 B. Strike 3 is Entitled to this Subpoena

23 Strike 3 understandably may be upset its copyrights are infringed so often; it is also
24 understandable others feel Strike 3 is abusing the legal system. Ultimately, however, caselaw
25 makes clear it would be an abuse of discretion to deny it leave for this subpoena. The Ninth
26 Circuit has not ruled on a request for a subpoena by Strike 3, but it has endorsed the general
27 scheme of limited discovery for copyright infringement. *Glacier Films (USA), Inc. v. Turchin*, 896

28 ORDER GRANTING LEAVE FOR SUBPOENA
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1 F.3d 1033, 1036 (9th Cir. 2018). Strike 3 needs this discovery to ascertain the identity of the
2 defendant. *Wakefield*, 177 F.3d at 1163. It satisfies the *seescandy* factors, 185 F.R.D. at 578.

3 Further, even if one wanted to distinguish this case from the general copyright scheme,
4 controlling law prevents consideration of the natural avenues of doing so, for reasons the D.C.
5 Circuit outlined in a case involving a Strike 3 subpoena: it would be an abuse of discretion to
6 consider the nature of the material, the possibility the case will fail, or Strike 3's pattern of
7 litigation. *Strike 3*, F.3d at 1203. This leaves no way to distinguish this case from any other
8 unknown-infringer case. First, pornography is entitled to copyright protections just like any other
9 content. *Jartech, Inc. v. Clancy*, 666 F.2d 403, 405–06 (9th Cir. 1982). Second, *Cobbler Nevada*
10 does not provide a basis to deny the subpoena at this stage. It held that being the account holder of
11 an infringing IP address does not even raise an inference of infringement, because many people
12 might have access to one such address. *Cobbler Nev., LLC v. Gonzales*, 901 F.3d 1142, 1145 (9th
13 Cir. 2018). In fact, the plaintiff in that case was allowed the subpoena, and a deposition of the
14 subscriber to determine details about the usage of the IP address. 901 F.3d at 1145. Third, at this
15 stage, the court must assume the truth of Strike 3's allegations and draw all reasonable inferences
16 in its favor. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1003 (9th Cir. 2018). This is true
17 despite criticism of Strike 3 and its attorney here—in a rare case which proceeded to summary
18 judgment—for making unsupported claims in its Complaint such that the case never should have
19 been brought. *Strike 3 Holdings, LLC v. Doe*, No. C17-1731 TSZ, 2020 WL 531996, at *5 (W.D.
20 Wash. Feb. 3, 2020), *aff'd*, 849 F. App'x 183 (9th Cir. 2021). Thus, although Strike 3's pattern of
21 litigation is appropriate for judicial notice, it cannot supply the grounds for denial of the request.
22 Fed. R. Evid. 201.

23 **C. Protective Measures**

24 Even if leave must be granted, the question of protective measures remains. Rule 26(c)
25 allows a court to grant a protective order if there is good cause. *McCoy v. Sw. Airlines Co., Inc.*,
26 211 F.R.D. 381, 385 (C.D. Cal. 2002). Courts routinely impose conditions on the grant of these
27 subpoenas, such as requiring the subscriber's name not be made public, and that court filings

1 discussing the identity must be redacted and sealed, at least until further discovery can be taken.
2 *See, e.g., Strike 3 Holdings, LLC v. Doe, No. 19-CV-00160-EMC, 2019 WL 591459, at *3 (N.D.*
3 *Cal. Feb. 13, 2019); Strike 3 Holdings, LLC v. Doe, No. 4:18-CV-04993-KAW, 2019 WL 468816,*
4 *at *2 (N.D. Cal. Feb. 6, 2019); Strike 3 Holdings, LLC v. Doe, No. 2:18-cv-02637-MCE-CKD,*
5 *2019 WL 935390, at *2 (E.D. Cal. Feb. 26, 2019)). Indeed, Strike 3 claims it welcomes protective*
6 *measures. This policy, along with not proposing settlements and only pursuing large-scale*
7 *offenders, ostensibly ensures justice is being done.*

8 Strike 3's policies are not as reassuring as it thinks. Large-scale infringement may logically
9 stem as often from one zealous user as from an IP address for a location with many users, in which
10 Strike 3's case may be impossible. Not proposing settlement may suggest Strike 3 is supremely
11 confident in its case. Finally, defendants may not know they may ask for anonymity.

12 To ensure Defendant is not unduly prejudiced, Plaintiff must attempt to ensure Defendant
13 knows he or she can proceed anonymously at the earliest possible opportunity, as ordered below.
14 The ISP must serve a copy of this order to Defendant, which would accomplish this purpose. Also,
15 Strike 3 is ordered to certify they have proposed a confidentiality agreement with Defendant. This
16 should pose no hardship as Strike 3 claims it has a policy of entering into confidentiality
17 agreements anyway.

18 V. CONCLUSION

19 1. Plaintiff has established that good cause exists for it to serve a third-party subpoena on
20 Comcast Cable (the "ISP").

21 2. Plaintiff may serve the ISP with a Rule 45 subpoena commanding the ISP to provide
22 Plaintiff with the true name and address of the Defendant to whom the ISP assigned an IP address
23 as set forth on Exhibit A to the Complaint. Plaintiff shall attach to any such subpoena a copy of
24 this Order;

25 3. Plaintiff may also serve a Rule 45 subpoena in the same manner as above on any service
26 provider that is identified in response to a subpoena as a provider of Internet services to
27 Defendant; the same requirements laid out for Comcast Cable in this order will also apply to any

1 follow-on orders pursuant to this section.

2 4. If the ISP qualifies as a “cable operator,” as defined by 47 U.S.C. § 522(5), which states:

3 the term “cable operator” means any person or group of persons (A) who provides
4 cable service over a cable system and directly or through one or more affiliates
5 owns a significant interest in such cable system, or (B) who otherwise controls or is
6 responsible for, through any arrangement, the management and operation of such a
7 cable system

8 it shall comply with 47 U.S.C. § 551(c)(2)(B), which states:

9 A cable operator may disclose such [personal identifying] information if the
10 disclosure is . . . made pursuant to a court order authorizing such disclosure, if the
11 subscriber is notified of such order by the person to whom the order is directed by
12 sending a copy of this Order to Defendant;

13 5. Plaintiff shall also request the ISP forward a copy of this order to the subscriber,
14 regardless of whether it qualifies as a cable operator. If the ISP declines, Plaintiff shall serve a
15 copy of this order on Defendant simultaneous to or before any other service or communication to
16 Defendant. Plaintiff must file a copy of its request to the ISP on the docket. Alternatively to the
17 other requirements in this paragraph, Plaintiff may file an affidavit that it attests the ISP has
18 forwarded this order to Defendant before attempting to serve or communicate with Defendant.

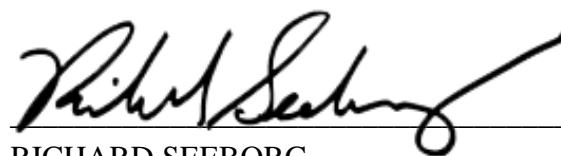
19 6. Plaintiff may only use the information disclosed in response to a Rule 45 subpoena
20 served on the ISP for the purpose of protecting and enforcing Plaintiff’s rights as set forth in its
21 Complaint. Specifically, Plaintiff must not publicly disclose the information obtained based on
22 this subpoena without leave of the court—at least until the Doe defendant has had an opportunity
23 to file a motion to proceed anonymously, or further discovery has been taken. All references to
24 Defendant’s identity must be redacted and filed under seal until further notice.

25 6. Plaintiff must first file an affidavit confirming it proposed confidentiality to Defendant, as it
26 represented it would to the court. This filing must contain the relevant communications concerning
27 any proposed agreement, e.g., copies of emails related to confidentiality, or descriptions of

1 conversations with Defendant.

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3 **IT IS SO ORDERED.**

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5 Dated: September 30, 2021

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9 RICHARD SEEBORG
10 Chief United States District Judge

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12 United States District Court
13 Northern District of California
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